Petition

Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS
CLERK

81-1750

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON, Petitioner,

v.

GLENN RUPHERT GIBSON, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORM MALENG
King County Prosecuting Attorney

J. ROBIN HUNT
Senior Deputy Prosecuting Attorney
Counsel of Record

RONALD M. GOULD
Special Deputy Prosecuting Attorney

Attorneys for Petitioner

W554 King County Courthouse
Seattle, WA. 98104
(206) 583-2200

QUESTIONS PRESENTED FOR REVIEW

1. Whether dual procedural failure which barred collateral attack in state court under state procedural rules should also bar federal habeas corpus relief.[1]

2. Whether perceived futility of objecting at trial or ignorance on appeal of a change in the law excuses, for purposes of federal habeas corpus, a defendant's failure to make timely objection to an erroneous jury instruction in the state courts, under the "cause" standard left open in Wainwright v. Sykes.

3. Whether Mullaney v. Wilbur applies retroactively in a federal collateral attack on a state court conviction where the defendant could have cited Mullaney on direct appeal under state procedural rules but did not do so.

---

1. This court has previously granted certiorari and heard argument on December 8, 1981, on related issues in Issac v.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption "State of Washington" includes James Spalding (former warden of Washington State Penitentiary at Walla Walla), Slade Gorton (former Attorney General for the State of Washington) and Dixie Lee Ray (former Governor of the State of Washington).

Engle (No. 80-1430) and United States v. Frady (No. 80-1595). A related petition for certiorari to the Ninth Circuit Court of Appeals was filed on December 4, 1981 in State of Washington v. Myers (No. 81-1056).

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List Of All Parties To The Proceedings	ii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions And Rules Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	9
Conclusion	28
Appendix A	1a-11a
Appendix B	12a-32a
Appendix C	33a-36a
Appendix D	37a-40a
Appendix E	41a
Appendix F	42a

TABLE OF AUTHORITIES

Cases

Page

Breest v. Perrin,
655 F.2d 1 (1st Cir. 1981) 19

Cole v. Stevenson,
620 F.2d 1053 cert. denied,
449 U.S. 1004 (4th Cir. 1980) .. 16,19

Collins v. Auger,
577 F.2d 1107, (8th Cir. 1978) .. 15

Fay v. Noia,
372 U.S.391 (1963) 12,23

Gibson v. Spalding,
665 F.2d 863 (9th Cir. 1981) 1

Hankerson v. North Carolina,
432 U.S. 233 (1977) .. 20,21,22,23,24,
25,26

Indiviglio v. United States,
612 F.2d 624 (2d Cir. 1979), cert.
denied, 445 U.S. 933 (1980) 18

In re Myers,
91 Wn.2d 120, 587 P.2d 532
(1978), cert. denied, 442
U.S. 912 (1979) 7,14,27

Isaac v. Engle,
646 F.2d 1129 (6th Cir. 1980), cert.
granted, ____ U.S. ____, 101 S. Ct.
1973, 68 L. Ed. 2d 294 (1981) ... 14

Mullaney v. Wilbur,
421 U.S. 684 (1975) .. 5,6,7,8,9,13,14
16,17,18,20,21,22,23,24,25

Myers v. State of Washington,
646 F.2d 355 (9th Cir. 1981),
petition for cert. filed, 30
Crim. L. Rep (BNA) 4187 (U.S.
Dec. 4, 1981)(No. 81-1056) 13

Runnels v. Hess,
653 F.2d 1359 (10th Cir. 1981) .. 15

Sanders v. United States,
373 U.S. 1 (1963) 26

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 24

State v. Roberts,
88 Wn.2d 337, 562 P.2d 1259 (1977) 4

Stone v. Powell,
428 U.S. 465 (1976) 24

Tyler v. Phelps,
622 F.2d 172 (5th Cir. 1980);
643 F.2d 1095 (5th Cir. 1981) ... 18

United States v. Frady,
636 F.2d 506 (D.C. Cir. 1980), cert.
granted, ____ U.S. ____, 101 S. Ct.
3142, 69 L. Ed. 2d 994 (1981) ... 15

Wainwright v. Sykes,
433 U.S. 72 (1977) ... 12,13,15,17,18,
19,21,22,23

Constitution, Statutes And Rules

United States Constitution,
Amendment XIV, § 1 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 8

RCW 4.32.290 2

Washington RAP 2.5(a) 2,5

Washington ROA I-46 2

OTHER AUTHORITIES

67 ABA Journal 290 (1981) 26

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Gibson v. Spalding is reported at 665 F. 2d 863 (9th Cir. 1981) and is reproduced in Appendix A (1a - 11a). In its order granting petition for writ of habeas corpus, the United States District Court for the Western District of Washington adopted the report and recommendation of the magistrate. The order and the report are reproduced in Appendix B (12a - 32a).

JURISDICTION

The opinion of the court of appeals was entered on October 30, 1981. (Appendix E, 41a). Rehearing en banc was denied January 5, 1982. (Appendix F, 42a).

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Court Rule of Appellate Procedure 2.5(a) - Errors Raised for First Time on Review[2]:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted,

---

2. RAP 2.5(a) became effective on July 1, 1976. Exceptions (1), (2), and the last sentence of section 2.5(a) were formerly found in ROA I-46 and RCW 4.32.290. Exception (3) codifies the Washington common law rule.

upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

STATEMENT OF THE CASE

On May 29, 1974, a jury in King County, Washington, found Glenn Ruphert Gibson guilty of murder in the second degree for the killing of a young woman late at night in a drainage ditch along a desolate back-country road. Gibson gave several conflicting statements to the police. His primary defense to the charge of intentional drowning was that the victim's death was not caused by drowning but by lethal combination of alcohol and phenobarbital. The physician who performed the autopsy testified that the victim's death was caused by drowning. Gibson cross-examined the State's expert extensively and also called his

own expert to testify about the cause of death.

In accordance with existing state law, the jury was instructed that if the State proved a homicide, it was presumed to be murder in the second degree. The jury was further instructed that the State had the burden of producing evidence sufficient to increase the degree to murder in the first degree and that the defense had the burden of showing facts or circumstances to reduce the homicide to manslaughter.[3] The text of this instruction is reproduced in Appendix A at 9a-10a.

Contrary to state procedural requirements, Gibson neither objected to this instruction at trial nor argued on appeal that this instruction shifted the

---

3. The Supreme Court of Washington has since held such instructions erroneous. State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977).

burden of proof to the defendant in violation of the due process clause of the Fourteenth Amendment.[4]

The Washington Court of Appeals affirmed Gibson's conviction on June 9, 1975. State v. Gibson, 13 Wn. App. 1013; the unpublished decision is reproduced in Appendix D (37a - 40a). That same day this Court held a similar instruction unconstitutional in Mullaney v. Wilbur, 421 U.S. 684 (1975) [hereinafter referred to as Mullaney]. The Mullaney decision was published the next day in United States Law Week, 43 U.S.L.W. 4695 (1975). The Criminal Law Reporter printed a full text, a summary, and an analysis of Mullaney two days after the Court

---

4. Wash. RAP 2.5(a) requires claimed errors to be raised at trial in order to preserve a right of review; however, the rule further allows certain constitutional errors to be raised for the first time on appeal. This rule is reproduced at pages 2-3.

announced it. 17 Crim. L. Rep. (BNA) 3063; 1041-42 (1975).

On August 20, 1975, Gibson petitioned the highest state court to review his conviction. He did not cite Mullaney and did not challenge the burden-shifting jury instruction. The Washington Supreme Court denied his petition on October 7, 1975. State v. Gibson, 85 Wn.2d 1019 (1975). Gibson did not ask the court to reconsider in light of Mullaney. Gibson did not seek direct review by the United States Supreme Court. At all times both at trial and on appeal Gibson was represented by counsel.

In March of 1978, four years after his conviction and three years after Mullaney, Gibson collaterally challenged the defective jury instruction and raised Mullaney for the first time when he filed a personal restraint petition in the intermediate state appellate court.

Finding that Gibson's failure to object at trial or on direct appeal foreclosed his collateral attack, the Washington Court of Appeals denied his petition in an unpublished opinion, In re Gibson, 23 Wn. App. 1009 (April 9, 1979), reproduced at Appendix C (33a - 36a).

In denying Gibson's petition, the court cited the state court rule that "failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent ... collateral attack," as explained by the highest state court in In re Myers, 91 Wn.2d 120, 123, 587 P.2d 532 (1978), cert. denied, 442 U.S. 912 (1979). On June 21, 1979, the court denied reconsideration of Gibson's petition. In September of 1979 the Washington Supreme Court declined to review the Court of Appeals decision. In re Gibson, 92 Wn.2d 1027 (1979).

On October 22, 1979, five and one-half years after his conviction, Gibson filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Washington. The "Mullaney" burden-shifting instruction was his sole ground for relief. The district court granted the petition and ordered the State to release or retry Gibson. (Appendix B, 12a - 32a).

The State appealed. On October 30, 1981, a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court decision. The Ninth Circuit presumed that Gibson's attorney had been unaware of Mullaney when he sought direct review in the State Supreme Court. The Ninth Circuit held that this ignorance excused his failure to object to the improper

jury instruction in state court. (Appendix A, 1a - 11a).

REASONS FOR GRANTING THE WRIT

In sustaining respondent Gibson's claim for relief in this case, the court of appeals has not merely released a murderer. The court of appeals also has ignored or misapplied controlling decisions of this Court and has radically expanded the scope of review available on collateral attack. While this case involves a standard jury instruction concerning the burden of proof in a murder prosecution, the reasoning of the court of appeals would be no less applicable in any case involving significant error in jury instructions or evidentiary rulings.

The court of appeals has held that the failure to object at trial to an erroneous jury instruction or to raise the point on direct appeal may be overlooked

solely on the ground that objection might have been "assumed" to be futile based on existing law. Under this rule any change or clarification in evolving law will prompt a new round of collateral attacks, and no conviction may be deemed final. Further, criminal defendants will be exempt from timely challenging existing laws by which they are aggrieved. Instead they may save such challenge until after another litigant has been successful.

The most serious offenders will reap the greatest benefits from the court of appeals' new rule. The longer the sentence, the greater will be the chance that an eventual change in the law will in hindsight describe an error at the earlier trial. Accordingly the federal courts will order the prisoner's release or retrial 1) in spite of his failure to raise the issue in state court in

accordance with state procedures, 2) without regard to laches, and 3) without regard to the state's ability to retry the case successfully years after the original conviction had been presumed final and impervious to further challenge. Under this new rule the lower federal courts are thus permitted to sit as "super courts," reviewing state court judgments, unfettered by the sensible time requirements normally accompanying direct appeals. To allow such collateral review violates the principles of finality of judgments and comity between the state and federal judiciaries.

1. There Is a Conflict Among the Circuits on the Question of Whether a Defendant's Failure To Perceive a Constitutional Error Constitutes "Cause" for Failure To Raise Timely Objection in State Court.

In Wainwright v. Sykes, 433 U.S. 72 (1977) [hereinafter referred to as

Wainwright], this Court rejected the broadly-worded dictum of Fay v. Noia, 372 U.S. 391 (1963), that only a "deliberate bypass" of state procedural rules would bar federal habeas review of constitutional errors. Instead, this Court articulated a narrower rule, barring federal habeas corpus review absent a showing of "cause and prejudice" excusing a failure to raise constitutional objections in a timely fashion in state courts under state procedural rules. 433 U.S. at 87. The precise definition of this standard was left "open for resolution in future decisions." Id.

Many of the circuit courts of appeals have since addressed the extent to which attorney ignorance, inadvertance, or perceived futility of objecting constitutes "cause" under the test established in Wainwright. The circuits, however, are in confict.

The Ninth Circuit in this case has held that presumed attorney ignorance constitutes "cause" for failure to raise an issue timely in the state court. Gibson, assisted by counsel, failed to object to a burden-shifting instruction both at his murder trial and on direct appeal to the intermediate state court. Mullaney was published while Gibson was seeking direct discretionary review by the highest state court, yet he failed to raise the issue.

The Ninth Circuit's decision here was based in part on its earlier decision in Myers v. State of Washington, 646 F.2d 355 (9th Cir. 1981), petition for cert. filed, 30 Crim. L. Rep (BNA) 4187 (U.S. Dec. 4, 1981)(No. 81-1056). In Myers, the Ninth Circuit found "cause" for failure to object to a burden-shifting jury instruction at trial or on appeal where the state court's direct review of his

conviction was completed prior to the decision in Mullaney. Here, however, the Ninth Circuit expanded upon Myers, ruling that presumed attorney ignorance of the Mullaney decision constitutes "cause" which excused Gibson's failure to object to the instruction in the state supreme court.

The Ninth Circuit's decisions in Gibson and Myers were premised in part on a case now before this Court, Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980) (en banc) (plurality opinion), cert. granted, _____ U.S. _____, 101 S. Ct. 1973, 68 L. Ed. 2d 294 (1981) (argued Dec. 8, 1981). In Isaac, the Sixth Circuit held that a defense attorney's perception that an objection at trial would be futile under then-existing state law constituted "cause" under Wainwright. Accord, United States v. Frady, 636 F.2d 506 (D.C. Cir. 1980), cert. granted, _____ U.S. _____,

101 S. Ct. 3142, 69 L. Ed. 2d 994 (1981) (argued Dec. 8, 1981).

Similarly, the Tenth and Eighth Circuits have ruled that for purposes of federal habeas review mere attorney ignorance or inadvertance is sufficient "cause" to excuse failure to comply with state procedural requirements that issues be timely raised in the state courts. Runnels v. Hess, 653 F.2d 1359 (10th Cir. 1981); Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978).

Thus, the trend in the Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits appears to be that any attorney omission short of a tactical decision constitutes sufficient "cause" for failure to comply with state procedural rules.

Three circuits are in direct conflict with this trend. The Fourth Circuit's resolution of this issue in Cole

v. Stevenson, 620 F.2d 1055, cert. denied, 449 U.S. 1004 (4th Cir. 1980), directly conflicts with the Ninth Circuit's resolution in the instant case. Cole, assisted by counsel, failed to object to a burden-shifting jury instruction at trial or on direct appeal in state court. Three years after his conviction was upheld on appeal, this Court ruled in Mullaney that such an instruction violates Fourteenth Amendment due process. Subsequently, Cole sought collateral relief in state court. As here, the state court denied relief because Cole had failed to raise the issue on direct appeal.

Cole next sought federal habeas corpus review, arguing that he should not have been expected to object to the instruction at trial or on direct appeal because Mullaney had not then been decided. Rejecting this contention, the

Fourth Circuit noted that other pre-Mullaney defendants, aware of existing constitutional principles involved, had timely objected to similar instructions. The court held that under Wainwright a defendant's retrospective excuse that an objection would have been futile is not "cause" sufficient to excuse his failure to make a timely objection.

Similarly the Second Circuit has rejected a federal defendant's attempt to raise collaterally a Fourth Amendment search and seizure claim which was not raised at trial or on direct appeal. The court held that "cause" excusing failure timely to present the claim could not be based on incompetence of counsel alleged by hindsight, where assistance of counsel satisfied constitutional standards under the Sixth Amendment. Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980).

In Tyler v. Phelps, 622 F.2d 172, 178 (5th Cir. 1980), the Fifth Circuit originally held that ineffective assistance of counsel, short of that necessary to establish a Sixth Amendment claim, is sufficient "cause" to excuse failure timely to object to a Mullaney-type burden-shifting jury instruction. The court remanded for reconsideration of the "cause" requirement of Wainwright. Retreating from its earlier reasoning, the Fifth Circuit has since vacated that decision in its entirety. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981). Although the failure to object was apparently not a trial tactic, the court held that without further explanation for the failure to object, the petitioner had not shown "cause."

The conflict among these circuits indicates uncertainty about the meaning of "cause" excusing state procederal

defaults under Wainwright v. Sykes. The First Circuit highlighted this uncertainty in Breest v. Perrin, 655 F.2d 1 (1st Cir. 1981), in affirming a lower court ruling based on the Fourth Circuit's Cole v. Stevenson, "without taking sides in the current controversy over whether 'futility' can ever constitute 'cause' under Sykes." 655 F.2d at 5. Without further guidance from this Court as to the scope of "cause" under Wainwright, the conflict and confusion will continue.

2. The Decision Below Conflicts with This Court's Implicit Holding in Hankerson that State Timely Objection Rules May Operate To Insulate Past Convictions From The Retroactive Application of Mullaney v. Wilbur.

This Court gave retroactive effect to Mullaney in Hankerson v. North Carolina, 432 U.S. 233 (1977). Hankerson was tried by a jury which was given a burden-shifting instruction similar to the one

in the instant case. Following Hankerson's conviction, this Court held a similar instruction unconstitutional in Mullaney. Unlike Gibson, Hankerson had taken the opportunity on direct appeal to object to the instruction, citing Mullaney. Hankerson had thus complied with North Carolina's timely objection rules.

Accordingly, on direct appeal from the North Carolina Supreme Court, the United States Supreme Court reversed Hankerson's conviction. In so holding, this Court expressly addressed fears that retroactive application of Mullaney would result in a flood of retrials:

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

432 U.S. at 244 n.8. Thus, the Court implicitly held that only those

defendants who had timely objected to infirm instructions in accordance with state procedural rules would be retroactively afforded the benefits of the Mullaney ruling.

Footnote 8 in Hankerson provided the states a means of protection against wholesale release and retrial of prisoners who were convicted under Mullaney-violative jury instructions. Protection was to come through the enforcement of state timely objection rules. Six days after deciding Hankerson this court ruled in Wainwright that for purposes of federal habeas corpus review the failure to make timely objections under state procedural rules would be excused only upon a showing of "cause and prejudice." It thus seems appropriate to read footnote 8 in Hankerson as giving meaning to "cause" in Wainwright, where a federal habeas corpus petitioner failed timely to object

to a Mullaney-violative instruction in state court.

Yet, the Ninth Circuit's interpretation of "cause" under Wainwright in this case ignores and effectively overrules footnote 8 in Hankerson. The court of appeals excuses Gibson's failure to perceive the constitutional infirmity of the burden-shifting jury instruction both before Mullaney and while appealing to the state supreme court after Mullaney. The Ninth Circuit's rule, echoed by the aforementioned trend in the Sixth, Eighth, Ninth, Tenth and District of Columbia Circuits, in substance revives the broad "deliberate bypass" standard of Fay v. Noia, contrary to this Court's clear holding in Wainwright that state procedural rules are to be accorded great deference in federal habeas proceedings. Under the Ninth Circuit's rule the impact of the retroactive application of

Mullaney cannot be mitigated by Washington's timely objection rules, as contemplated by this Court in footnote 8 in Hankerson.

3. The Decision Below Clashes With Principles of Finality and Respect for State Procedural Rules Stressed by this Supreme Court in Limiting Federal Habeas Review of State Court Convictions.

As members of this Court have frequently noted, important interests are served by limiting federal habeas collateral attack upon state criminal convictions:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

Stone v. Powell, 428 U.S. 465, 491 n.31 (1976), quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring). By readily excusing failure to raise a constitutional issue in state court, in a manner that is timely under state procedural rules, the Ninth Circuit has ignored these important interests.

In Hankerson v. North Carolina, 432 U.S. 233 (1977) this Court showed respect for finality of judgments and wise use of limited judicial resources in giving limited retroactive effect to Mullaney and allowing the states to employ timely objection rules to insulate convictions from collateral attack.

In his concurrence in Hankerson, Justice Powell further highlighted the need for finality. Suggesting that retroactivity of Mullaney be limited to cases pending on direct appeal, he warned

of the costs of making a new constitutional principle fully retroactive:

> Convictions long regarded as final must be reconsidered on collateral attack; frequently they must be overturned for reasons unrelated to the guilt or innocence of the prisoner, and in spite of good-faith adherence on the part of police, prosecutors and the courts to what they understood to be acceptable procedures. Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense.

432 U.S. at 247.

Chief Justice Warren Burger has advanced like concerns in his Annual Reports to the American Bar Association, January of 1981 and 1982. See 67 ABA Journal 290 at 293 (1981) and p. 2 of his 1982 speech.

Similar ideals were voiced by the late Justice Harlan, dissenting fourteen years before Hankerson in Sanders v. United States, 373 U.S. 1, 24-25 (1963):

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Accepting Hankerson's invitation to insulate past convictions, the Supreme Court for the State of Washington also espouses this balancing of interests:

> We find that the interest of the state in achieving a final judgment not subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards. Executive clemency and the parole system are available for those cases that are particularly deserving. Accordingly, we hold that the general rule -- i.e., the failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent proceedings -- applies to alleged errors raised for the first time on collateral attack.

In re Myers, 91 Wn.2d at 124-5, 587 P.2d at 534-5.

Yet, the Ninth Circuit below rejected these values strongly held by both the Washington and United States Supreme Courts when it permitted tardy collateral attacks in federal court based on an issue which could have been raised in a timely manner in the state courts.

CONCLUSION

For these reasons a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

NORM MALENG
King County
Prosecuting Attorney

By J. ROBIN HUNT
Senior Deputy
Prosecuting Attorney

RONALD M. GOULD
Special Deputy
Prosecuting Attorney

Attorneys for Respondent

March 1982

Appendix

APPENDIX A

Glenn Ruphert GIBSON,
Plaintiff-Appellee,

v.

James SPALDING, Slade Gorton and
Dixie Lee Ray,
Defendants-Appellants.

No. 80-3522

United States Court of Appeals,
Ninth Circuit,

Argued and Submitted July 8, 1981.

Decided October 30, 1981

Before WALLACE and TANG, Circuit Judges, and STEPHENS*, District Judge.

WALLACE, Circuit Judge:

Spalding, et al. (the State), appeal from an order of the district court granting a writ of habeas corpus to Gibson pursuant to 28 U.S.C. § 2254. The State contends that Gibson's failure to object to a constitutionally infirm jury instruction during trial or on direct appeal prevented the district judge from granting this collateral relief. We disagree and affirm.

I

On May 29, 1974, a jury found Gibson guilty of murder in the second degree resulting from the death of a female hitchhiker. Gibson appealed his conviction on grounds other than the one asserted in

his petition for writ of habeas corpus. The Washington State Court of Appeals affirmed his conviction in an unpublished opinion on June 9, 1975. On that same day, the United States Supreme Court decided Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 308 (1975) (Mullaney), in which the Court held that a jury instruction requiring malice aforethought to be presumed from an intentional homicide unless the defendant proved that he acted in the heat of passion on sudden provocation violated the due process clause of the Fourteenth Amendment. The Court found that such an instruction improperly shifted the burden of persuasion from the prosecution to the defense.[1] The Mullaney decision was published the next day in United States Law Week, 43 U.S.L.W. 4695 (1975). The following day, the Criminal Law Reporter printed the full text and a summary and analysis of the decision. [1975] 17 Crim. L. Rep. (BNA) 1041-42; 3063. Although a similar instruction was given to the jury in Gibson's trial, there was no objection during trial and no assignment of error in his initial appeal.

Gibson, still assisted by counsel, filed a petition for review before the Washington Supreme Court on August 20, 1975, but once more the jury instruction was not raised as an issue. The

---

1. The Supreme Court held Mullaney fully retroactive in Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977). The court, however, left open a way for the states to avoid the full retroactive application of the Mullaney rule by stating in a footnote in Hankerson that:

Washington Supreme Court summarily rejected Gibson's petition on October 7, 1975. Despite the four month interval between the Mullaney decision and the Washington Supreme Court's action, there was no attempt to seek reconsideration of the state Supreme Court's denial of Gibson's petition.

In March of 1978, Gibson filed a personal restraint petition -- the Washington equivalent of a habeas corpus petition. He raised for the first time his contention that the jury instruction given at his 1974 trial violated Mullaney, and thus entitled him to a new trial. The Washington Court of Appeals denied his habeas corpus petition in an unpublished opinion on April 9, 1979. The court also denied Gibson's motion for reconsideration of its decision. In September of 1979, the Washington State Supreme Court summarily denied Gibson's petition for review of the court of appeals' decision.

Gibson then sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254. His sole ground for relief was that the trial court erred in giving the challenged instruction which, he contends, was condemned by Mullaney. The district court assigned the case to a

---

> [t]he States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed. R. Crim. Proc. 30.

Id. at 244 n.8, 97 S. Ct. at 2345.

magistrate who recommended that the district court grant petitioner's relief. The district court accepted the magistrate's findings without comment, and issued an alternative writ requiring Gibson's release or retrial.

II

The State argues that Gibson's failure at both his trial and on direct appeal to attack the suspect jury instruction was not excused by "cause" or "prejudice" sufficient to invoke the exception to Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Sykes). In Sykes, the Court held that a federal habeas petitioner is barred from asserting that federal constitutional law was violated in a state court proceeding when that assertion was not resolved on the merits in a state proceeding due to the petitioner's own failure to raise it there, as required by a state contemporaneous objection rule. The Court found that absent a showing of "cause" for the failure to object and actual "prejudice" to the petitioner from the alleged constitutional violation, federal habeas relief was precluded by the state procedural default.

Washington courts have developed a similar procedural rule on the appellate level. The Washington Supreme Court has held that "issues which could have been raised on appeal but were not, may not be used as grounds for a collateral attack on a criminal judgment." Petition of Myers, 91 Wash.2d 120, 122, 587 P.2d 532, 533 (1978)(en banc), cert. denied, 442 U.S. 912, 99 S. Ct. 2828, 61 L. Ed. 2d 278 (1979). Here, there was no objection during trial or on direct appeal. Gibson

argues, however, that we must carefully scrutinize the procedural grounds that the state proposes as a bar to federal habeas review. He contends that the procedural rule involved in the instant case does not qualify as an "adequate" state ground because: (1) state review was refused on state procedural, rather than federal substantive grounds; (2) the rule was unforeseeable; (4) the rule is not a contemporaneous objection rule because it applies to a failure to object made on appeal; and (5) the rule is applied inconsistently and arbitrarily.

We recently examined the applicability of the Sykes rule to a similar factual situation in Myers v. Washington, 646 F.2d 355 (9th Cir. 1981) (Myers). There, the habeas petitioner challenged a jury instruction similar to the instruction involved in the case before us. When Myers was tried for murder in 1957, the instruction was considered constitutional. We found that the procedural default involved in the Myers case differed substantially from the procedural default involved in Sykes. Myers involved a failure to raise on appeal a constitutional issue that had never been identified at the time of trial or at the time of direct appeal, not simply a failure to object during trial to an alleged error that should have been apparent at that time. We raised the question of the applicability of the procedural default rule in Sykes to the Myers case. Id. at 359-60. We also discussed the interests identified in Sykes that are advanced by requiring the federal habeas court to comply with a state contemporaneous objection rule. First, federal compliance "enables the judge who observed the demeanor of [the] witnesses to make the

factual determinations necessary for properly deciding the federal constitutional question." Sykes, supra, 433 U.S. at 88, 97 S. Ct. at 2507. Second, were the federal habeas court not to enforce the contemporaneous objection rule, lawyers might be encouraged to "sandbag" -- take their chances on a verdict of not guilty in a state trial court with the intent, if they lose, to raise the constitutional claim before a federal habeas court. Id. at 89, 97 S. Ct. at 2508. Finally, adherence to a state contemporaneous objection rule maintains integrity in the state judicial process by encouraging that state trial proceedings be as free from error as possible. Id. at 90, 97 S. Ct. at 2508. We found that none of those interests were implicated in a situation where the procedural default consists of a failure to raise on appeal a constitutional issue that was impossible for the defendant to recognize at the time the appeal was taken. Myers, supra, 646 F.2d at 359.

We then tested whether Myers met the Sykes cause and prejudice requirements, and found both clearly met. Id. at 360. However, whether we treat the Sykes rule as inapplicable to the Myers situation or consider those circumstances sufficient to satisfy the "cause" and "prejudice" requirements of Sykes is unimportant. The case before us is distinguishable from Myers. The Washington Court of Appeals affirmed Gibson's conviction on the same day that the Supreme Court held in Mullaney that a jury instruction similar to the one used in Gibson's trial was unconstitutional. With the aid of his attorney, Gibson petitioned the Washington Supreme Court for review. At that time there was no assignment of the

jury instruction as error, even though the Mullaney opinion had been published in U.S. Law Week and the Criminal Law Reporter over two months previous to his petition. Two months later, the petition was denied by the Washington Supreme Court. Thus, this situation is clearly distinguishable from Myers. Gibson and his attorney had a four month period in which to raise the jury instruction issue before the Washington Supreme Court. It is possible in such a situation that a defense attorney may intentionally omit an argument while preparing his appeal with the intent of saving the issue for federal habeas consideration. In addition, adherence to the contemporaneous objection rule in the instant situation encourages the state appeals court to enforce strictly its own rule because the state court will not be faced with the possiblity that a federal habeas court will later ignore the rule and decide the constitutional question "without the benefit of [the state's] views." Sykes, supra, 433 U.S. at 90, 97 S. Ct. at 2508. We need not examine in detail each of Gibson's arguments with respect to the inapplicability of the Sykes rule, as we hold it clearly applies.

We conclude, however, that Gibson has made a sufficient showing of "cause" and "prejudice" to satisfy the Sykes rule and overcome the bar to federal habeas review. He has asserted two separate grounds for meeting the cause requirement. First, on the authority of Myers he argues that cause for his failure to raise the constitutional issue on direct appeal exists because the change in the law on jury instructions ocurred after he had filed his direct appeal. See Issac v. Engle, 646 F.2d 1129, 1133-34 (6th

Cir. 1980) (en banc) (plurality opinion), cert. granted, ____ U.S. _____, S. Ct. 1973, 68 L. Ed. 2d 294 (1981). As we have previously discussed, however, we do not find that the case before us fits within Myers since Gibson had over four months after the Mullaney decision in which to raise the jury instruction argument before the Washington Supreme Court.

Gibson also argues that his failure to object was due to the ineffective assistance of counsel. In Garrison v. McCarthy, 653 F.2d 374 (9th Cir. 1981), we recently discussed how the "cause" prong of Sykes applies when the procedural default occurs as a result of action or inaction of the petitioner's counsel. We distinguished an attorney's failure to object for tactical reasons from an attorney's failure to object based upon his or her inadvertence or ignorance of the law. We held that in those cases involving a tactical decision, the defendant cannot meet the "cause" prong of Sykes unless he or she can show that the attorney's decision not to object amounted to a Sixth Amendment violation. Id. at 378. In dicta, we suggested that in cases involving attorney inadvertence or ignorance of the law, a defendant may satisfy the cause prong with proof short of that necessary to make out a Sixth Amendment claim. Id.

We cannot fathom any tactical reason for Gibson's attorney's failure to raise the Mullaney objection in this case. The only reason we can perceive from the record for the failure of Gibson's attorney to call it to the attention of the state court at some point during the four-month interval between the filing of his appeal and the

court's decision is that he was unaware of the decision. Gibson has met his burden of satisfying the cause prong of Sykes. There is no reason to remand this case for an evidentiary hearing.

Gibson has also made a sufficient showing of "prejudice." In Myers, we held that the prejudice prong of Sykes was satisfied because of "the crucial role the challenged jury instructions could have played in securing appellant's conviction." Myers, supra, 646 F.2d at 360. No evidence was required. The Supreme Court recognized the critical role that the burden of proof plays in a criminal proceeding in In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). There, the Court held that due process requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime." Id. at 364, 90 S. Ct. at 1072.

The State argues that the district court erred in finding that Gibson was prejudiced by the instruction based upon the fact that the magistrate presumed prejudice on an inadequate record. We disagree. The jury was instructed that if the State prove a homicide beyond a reasonable doubt, the presumption was that it was a murder in the second degree. The jury was further instructed that in order to reduce the charge to manslaughter, the defendant had the burden of proving the existence of mitigating circumstances.[2] Thus, the

---

2. The jury was instructed as follows:

> The Court instructs you that where a homicide is proved beyond a

instruction shifted the burden to the defendant on the crucial element of intent. Gibson's defense was based upon his contention that the victim's death was not due to any intentional act on his part, but was instead due to the victim's ingestion of lethal amounts of drugs and alcohol. It is impossible to determine accurately what effect the instruction had on the jury's verdict. Given the critical role that the burden of proof plays in a criminal trial, we were justified in Myers in holding that prejudice was demonstrated in the giving of the instruction itself. Thus, the district court could properly conclude that Gibson was prejudiced and no evidentiary hearing was necessary.

III

In light of our conclusion that Gibson has made a sufficient showing of "cause" and "prejudice" under Sykes, we must now consider whether the jury

---

reasonable doubt, the presumption is that it is murder in the second degree. If the state desires to increase the degree to murder in the first degree, the burden is on the state to produce evidence of those facts or circumstances which call for such increase. If the defendant desires to reduce the degree to manslaughter, the burden is on him to produce evidence of those facts and circumstances which call for such reduction.

instruction given at his trial unconstitutionally shifted the burden of proof to him to produce evidence sufficient to reduce the charge from second degree murder to manslaughter.

In Mullaney, the Supreme Court held unconstitutional a state rule under which juries were instructed to presume that an intentional, unlawful killing was murder unless the defendant proved by a preponderance of the evidence that he had acted in the heat of passion on sudden provocation. We held in Myers that an instruction similar to the one given in this case was indistinguishable from the unconstitutional instruction in Mullaney.[3] In fact, the State concedes that the challenged instruction is unconstitutional. Thus, we hold, as we did in Myers, that the jury instruction given at Gibson's trial violated the due process clause as interpreted in Mullaney. Thus, the district court correctly issued the alternative writ requiring the release of Gibson or a new trial.

AFFIRMED.

---

3. The challenged instructions in Myers also shifted the burden of proof to the defense on the intent element of second-degree murder. Myers v. Washington, 646 F.2d 355, 362 n.11 (9th Cir. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLENN RUPHERT GIBSON,	)	
	)	
Petitioner,	)	NO. C79-1236M
	)	
vs.	)	
	)	
JAMES SPALDING, et al.,	)	ORDER GRANTING
	)	PETITION FOR
Respondents.	)	WRIT OF HABEAS
	)	CORPUS

The Court has reviewed the Petition for Writ of Habeas Corpus, Respondents' Motion to Dismiss, the memoranda of the parties, the Report and Recommendation of United States Magistrate John L. Weinberg, and the balance of the record herein. It is therefore ORDERED:

1. Said Report and Recommendation is hereby approved and adopted;

2. For the reasons stated in said Report and Recommendation, Respondents' Motion to Dismiss is denied;

3. The Court finds the Petition and Response present no issues of fact, and therefore no evidentiary hearing is required;

4. The Court further concludes that Petitioner is entitled to a Writ of Habeas Corpus;

5. Respondents may commence retrial of Petitioner within ninety (90) days after this order becomes final, including the conclusion of any and all appeals from this order;

6. In the event Respondents elect not to retry Petitioner at all, or such

retrial is not timely commenced, Petitioner shall be released forthwith from this order;

6. In the event Respondents elect not to retry Petitioner at all, or such retrial is not timely commenced, Petitioner shall be released forthwith from custody by reason of the conviction challenged in his Petition.

7. The Clerk shall direct copies of this order to Petitioner, to counsel for both parties and the United States Magistrate John L. Weinberg.

DATED this 29th day of August, 1980.

/s/ William Copple*
United States District Judge

* Visiting judge from United States District Court for Arizona.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLENN RUPHERT GIBSON,	)	No. C79-1236
	)	
Petitioner,	)	
	)	
vs.	)	REPORT AND
	)	RECOMMENDATION
JAMES SPALDING, et al.,	)	
	)	
Respondents.	)	
	)	

INTRODUCTION AND SUMMARY

This habeas corpus petition presents interesting and important issues concerning retroactivity of a Supreme Court decision. These issues have been ably briefed by counsel.

For the reasons set forth below, I recommend the court conclude as follows:

(1) The pleadings raise no issues of fact, and therefore no hearing is required;

(2) Respondent's Motion to Dismiss should be denied; and

(3) The petition is well taken, and should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was charged with first degree murder in connection with the death of a female hitchhiker in January, 1974. At his trial in the King County Superior Court in May 1974 the jury was instructed:

> The court instructs you that where a homicide is proved beyond a

> reasonable doubt, the presumption is that it is murder in the Second Degree. If the state desires to increase the degree to Murder in the First Degree, the burden is on the state to produce evidence of those facts or circumstances which call for such reduction.

This instruction was in accordance with then-accepted Washington law, and was not challenged at trial. The jury convicted petitioner of second degree murder, and the Court sentenced him to twenty years. The Court of Appeals of Washington affirmed the conviction on June 9, 1975 by unpublished opinion, State v. Gibson, 13 Wn. App. 1013 (1975). While the record in this Court contains no copy of that opinion, the validity of the instruction was apparently neither raised in the appeal nor addressed by the Court.

On the same day as petitioner's conviction was affirmed, the United States Supreme Court held in Mullaney v. Wilbur, 421 U.S. 684 (1975), that a similar jury instruction was constitutionally invalid, in that it shifted the burden of proof to the defendant as to an element of the offense.

Petitioner then sought review of his conviction in the Supreme Court of Washington. Again, he did not present any issue as to the instruction. The petition was denied on October 7, 1975, State v. Gibson, 85 Wn.2d 1019 (1975).

Petitioner filed a "Personal Restraint Petition" in March of 1978 in the Court of Appeals of Washington, raising for the first time the issue concerning the instruction. The petition was denied by that Court in April 1979 after a hearing. In re Gibson, 23 Wn. App. 1009

(1979). A copy of that Court's unpublished opinion is attached to the petition. The Supreme Court of Washington denied review in September of 1979. In re Gibson, 92 Wn.2d 1027 (1979).

Petitioner now seeks habeas corpus relief from this court. The only issue he presents is the validity of the jury instruction. He has exhausted his state remedies on this issue in the proceedings on his personal restraint petition.

The three respondents (here jointly referred to as "State") have moved to dismiss. The parties have fully briefed their positions, and neither has requested a hearing. No factual issues are presented by the record, and therefore no hearing is necessary.

ISSUE

The central issue presented by the petition is not whether the jury instruction was valid. The State concedes it was not, as indeed it must. Rather, the issue is whether petitioner is foreclosed from presenting the issue at all because his first attempt to do so was in his Personal Restraint Petition.

ANALYSIS

I. BURDEN-SHIFTING INSTRUCTIONS: MULLANEY AND ITS PROGENY

At the time of petitioner's trial, the instruction placing upon petitioner the burden of reducing the offense to manslaughter was in accordance with established Washington law. Not suprisingly, there was no objection to the instruction at trial, and no error assigned to it on direct appeal.

In Mullaney, the U.S. Supreme Court considered an instruction from the State of Maine which required that a defendant charged with murder must prove that he acted "in the heat of passion or sudden provocation" to reduce the homicide to manslaughter. Defendant had challenged the instruction on direct appeal and again in a federal habeas corpus petition. The U.S. Supreme Court concluded the instruction violated due process because it violated the fundamental requirement that the state has the burden to prove every element of a criminal offense beyond a reasonable doubt. Building upon In Re Winship, 397 U.S. 358 (1970), the court observed:

> In Winship the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the state has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase likelihood of an erroneous murder conviction.

421 U.S. at 700-701.

The Supreme Court of Washington applied the Mullaney rule in a case where the trial occurred after the Mullaney decision. State v. Roberts, 88 Wn.2d 337 1977). The issue is therefore settled for all future cases.

But it is far from settled as to cases, like this one, where the trial

preceded Mullaney, but the instruction was challenged later.

The U.S. Supreme Court addressed itself to the issue of the retroactivity of Mullaney in Hankerson v. North Carolina, 432 U.S. 233 (1977). That case involved an instruction which related to self-defense, but which was subject to the same burden-shifting infirmity as the instructions in Mullaney and in this case. As in this case, the trial in Hankerson had preceded Mullaney, and defendant had interposed no objection to the instruction at trial. Unlike this case, however, defendant in Hankerson did challenge the instruction on direct review of his conviction for second degree murder.

Reversing the Supreme Court of North Carolina, the U.S. Supreme Court held the Mullaney rule was entitled to "complete retroactive effect." 432 U.S. at 243. Writing for the Court, Mr. Justice White observed that Winship had been given retroactive effect in Ivan V. v. City of New York, 407 U.S. 203 (1972). The Court concluded that Ivan V., was controlling in Hankerson. 432 U.S. at 242. The following basic principles governing retroactivity, stated initially in Williams v. United States, 401 U.S. 646, 653 (1971), and quoted with approval in Ivan V., supra, at 204, were quoted and followed again in Hankerson:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding functions and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete

> retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

432 U.S. at 241. Holding that the new constitutional doctrine announced in Mullaney met this standard, the Court in Hankerson gave the doctrine "complete retroactive effect."

II. THE REACH OF "COMPLETE" RETROACTIVE EFFECT

As clear as the phrase "complete retroactive effect" might seem, later cases have reached conflicting results where (as in this case) the first challenge to the defective instruction came on collateral attack.

A. Washington Cases

In a case involving an instruction defective under Mullaney, In Re Myers, 91 Wn.2d 120 (1978), cert. denied, ____ U.S. ____, the Supreme Court of Washington held that an alleged error, even of constitutional dimension, cannot be raised on collateral attack if it has not been raised at trial or on direct appeal. 91 Wn.2d at 125. The Court held that the petitioner's failure to raise the issue constituted a waiver, despite the fact that his trial and appeal were completed many years prior to the ruling in Mullaney. Indeed, that lapse of time was the principal basis for denying the petition. The Court relied upon the

"negative effect upon the administation of justice," (91 Wn.2d at 123). The Court did not discuss, however, the meaning of "complete retroactive effect," as used by the U.S. Supreme Court in Hankerson. Nor did it mention its own holding in Koehn v. Pinnock, 80 Wn.2d 338 (1972):

> An applicant for a writ of habeas corpus who deliberately bypasses his available remedy by appeal thereby waives his right to challenge in habeas corpus the claimed errors occurring at his trial, except for grave constitutional errors. (Emphasis supplied.)

80 Wn.2d at 340.

In attempting to apply these various decisions, different divisions of the Court of Appeals of Washington have reached different conclusions. Division One of that Court concluded that Myers required denial of the personal restraint petition in the case at bar. In re Gibson, supra. But in a very similar case, In re Perkins,[1]/ 24 Wn. App. 1043 (1979), Division Two of that court reversed a murder conviction and remanded for a new trial. Although the petitioner in Perkins had never challenged the instruction at trial or on appeal, the Court distinguished Myers on grounds that proceedings on direct appeal in Perkins were not yet final when Mullaney was decided.

1/ A copy of this unpublished decision is attached to Petitioner's Memorandum, docket #10.

B. Cases From Other States and Federal Districts

At least one case from the Supreme Court of another state is instructive. The Supreme Court of West Virginia grappled with the issue in Jones v. Warden, 241 S.E. 2d 914 (W.Va. 1978), cert. denied, 439 U.S. 830 (1978). That Court (like the Supreme Court of Washington) had previously held that the Mullaney rule was to be applied only to cases then in trial or appellate process, but should not otherwise be retroactive. State v. Pendry, 227 S.E. 2d 210, 224 (W.Va., 1976). But after the U.S. Supreme Court opinion in Hankerson, the West Virginia Supreme Court felt compelled to overrule Pendry. Accordingly, in Jones v. Warden, supra, the Court awarded a writ of habeas corpus to a petitioner whose appeal had long since been completed at the time Mullaney was decided.

In the last few years, the U.S. District Courts in a number of districts have been faced with these same issues in habeas corpus challenges to state murder convictions under Mullaney. In Cole v. Stevenson, 447 F. Supp. 1268 (E.D. N.C., 1978), on facts strikingly similar to those in this case, the Chief Judge of that district concluded that the petitioner was entitled to a writ, and to a retrial or his release. The Court's reasoning was in most respects very close to that recommended herein.

Other cases in which U.S. District Courts have granted, and Courts of Appeals have affirmed, writs of habeas corpus under like circumstances include Berrier v. Egeler, 428 F. Supp. 750 (E.D. Mich., 1976), affirmed, 583 F.2d 515 (6th Cir., 1978), cert. denied, 439 F. Supp.

802 (S.D. W.Va., 1978); Graham v. Maryland, 454 F. Supp. 643 (D. Md., 1978); Gardner v. Forister, 468 F. Supp. 761 (W.D. N.C., 1979); Holloway v. McElroy, 474 F. Supp. 1363 (M.D. Ga., 1979); and Hunter v. Williams, 570 F.2d 510 (4th Cir., 1978).

C. Summary

In summary, the cases seem to establish the following pattern as to the retroactivity of Mullaney:

(1) Trial held after Mullaney decision.

Mullaney applies. State v. Roberts.

(2) Trial before Mullaney, but issue raised on direct appeal.

Hankerson controls, and Mullaney applies. Gardner v. Forister.

(3) Trial before, some appellate steps after Mullaney, but issue first raised on collateral attack.

Washington cases are conflicting. In re Gibson (writ denied); In re Perkins (writ granted).

(4) Trial and appeal process completed before Mullaney. Issue first raised on collateral attack.

Washington case, In re Myers, conflicts with Jones v. Warden, Cole v. Stevenson, Berrier v. Egeler, and Graham v. Maryland.

III. APPLICATION OF AUTHORITIES TO THIS CASE

A. Does Petitioner Prevail Because His Appellate Process was not Complete?

Petitioner earnestly offers a simple escape from these complex and conflicting decisions on retroactivity. He points out that the appellate process in his case was not yet complete when Mullaney was decided. His petition for review in the Supreme Court of Washington was prepared, filed and ruled upon, all subsequent to Mullaney. Thus, he argues, his case was still "on appeal" when Mullaney was decided; and he is entitled to its benefits.

If the Court were to accept his argument, it would not be required to resolve the question of whether a petitioner (like the petitioner in Myers) whose appeal was already final can rely on Mullaney in mounting a collateral attack.

But the problem with petitioner's argument is that, while he could have, he did not challenge the instruction in his petition for review on direct appeal. This is no doubt attributable to the fact that only a short time elapsed between the Mullaney decision and the filing of the petition for review in this case. The State does not argue that petitioner waived the issue entirely because he did not raise the issue in his petition for review. But this court should not accept petitioner's contention that, because he had (and missed) an opportunity to raise the Mullaney issue on direct appeal, he is somehow in a better position than a petitioner who never had that opportunity.

B. Does Mullaney Apply Retroactively in Collateral Proceedings?

We must therefore face squarely the central issue in this case; whether Mullaney applies retroactively to cases where the issue is first raised on collateral attack.

At the outset, both sides must acknowledge that the actual holding in Hankerson does not directly control this case. In commenting upon the denial of certiorari in Jones v. Warden, Mr. Justice White, the author of the Court's 1977 opinion in Hankerson, observed that Hankerson did not "expressly" decide the issue of whether Mullaney is to be applied retroactively to collateral proceedings. 439 U.S. at 1021 (1978). As previously noted, the defendant in Hankerson had challenged the instruction on direct appeal. The holding that he was entitled to retroactive benefit from Mullaney therefore does not necessarily establish that petitioner in this case is - or is not - likewise entitled.

As previously noted, the Supreme Court of Washington, in Myers, limited the retroactive effect of Mullaney to cases where the issue is raised at trial or on direct appeal. The State urges this Court to reach the same result.

In evaluating the State's contention, this Court must first determine whether it is a correct extrapolation from Mullaney and Hankerson - i.e., an accurate prediction of how the Supreme Court will rule on this issue when it is presented. I recommend the Court conclude it is not. Hankerson gave "complete retroactive effect" to Mullaney. There was no indication of a limitation to direct appeal cases. More

fundamentally, however, the rationale of those two cases is that some defendants are likely to be unjustly convicted of murder because they fail to sustain a burden of proof improperly placed upon them by an unconstitutional instruction. This reasoning applies with equal force, whether a defendant raises the issue first on direct appeal or on collateral attack. The Court regarded this error as so serious and fundamental that neither goodfaith reliance on the former rule, nor severe impact upon the administration of justice, would require prospective application. This is in sharp contrast with the reliance by the Supreme Court of Washington in Myers upon the "negative effect upon the administration of justice."

Finally, the distinction of direct appeal cases from collateral attack cases, for purposes of retroactivity, has been espoused by certain Justices of the U.S. Supreme Court in several cases, but has never yet commanded a majority. Mr. Justice Harlan stated the position at length in his opinion dissenting in Williams v. United States and concurring in Mackey v. United States, 401 U.S. at 675 (1971). In fact, two concurring justices in Hankerson indicated they endorsed that approach, and would have voted to reverse Hankerson's conviction because the case arises on direct review.

But significantly, Mr. Justice White, author of the court's opinion in Hankerson, did not follow that approach. The decision to give "complete retroactive effect" to Mullaney was based on the gravity of the constitutional error, not the procedural setting in which the issue was raised.

In summary, therefore, this Court should conclude Mullaney is to be applied retroactively, even where the issue is first raised on collateral attack, because: (a) Hankerson gave Mullaney "complete retroactive effect," (b) the reasoning of the two cases applies with equal force, whenever the issue is first raised; and (c) the U.S. Supreme Court has never, to date, accepted a direct appeal v. collateral attack distinction as determinative for purposes of retroactivity.

C. Is Petitioner's Conviction "Insulated" By a State of Washington Procudural Rule?

Quite apart from the question of how the U.S. Supreme Court would or will rule on the basic retroactivity issue, the State urges that Washington has validly insulated past convictions by the procedural rule announced in Myers. The State directs this Court's attention to footnote 8 of the U.S. Supreme Court's opinion in Hankerson:

> 8/ Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The

> North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed. Rule Crim. proc. 30.

432 U.S. at 244.

But while some states might be able to insulate convictions becaue of failure to object at trial to a constitutionally defective instruction, Washington cannot. The Supreme Court of Washington so recognized in In re Myers, supra, at 123-4:

> In cases on direct appeal, we have uniformly reviewed questions of constitutional dimension, even though they were not raised at trial. (Citations omitted.)

Thus, under Washington law, petitioner's failure to object to the instruction at trial did not foreclose him from raising a constitutional challenge to it on direct appeal. Footnote 8 in Hankerson therefore does not directly provide any "insulation" for his conviction.

But the State urges that a different state procedural rule, announced by the Court in Myers, provides such insulation. The Court started by reiterating the rule that, "... issues which could have been raised on appeal but were not, may not be used as grounds for a collateral attack on a criminal judgment." 91 Wn.2d at 122. But the Court went on to reformulate the rule as follows:

> Accordingly, we hold that the general rule - i.e., the failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent proceedings - applies to alleged errors raised for the first time on collateral attack.

91 Wn.2d at 125.

In essence, this eliminated the previous requirement that the issues must be ones which could have been raised at trial.[2] This is borne out not only by the Court's own formulation of the rule, but by the facts in the Myers case. The trial and all direct appeal proceedings in Myers were completed long before the decision in Mullaney cast a cloud of doubt over the instruction used at trial in that case.

In any event, this Court must accept Myers as a current statement of the law of Washington. The Court of Appeals of Washington had no choice but to conclude that petitioner was foreclosed, under Myers, from obtaining collateral relief in state court. The question this Court must determine is whether the same procedural rule operates to deny federal habeas corpus relief.

The U.S. Supreme Court has spoken frequently, and not always consistently, on the question of when state procedural waivers foreclose federal habeas corpus relief. The most recent holding seems to be in Wainwright v. Sykes, 433 U.S. 72 (1977).[3] The court held that a state

---

[2] As noted above, it also seems to have eliminated, without discussion, the holding in Koehn v. Pinnock, supra, that "grave constitutional errors" are not so waived. 80 Wn.2d at 340.

procedural waiver bars federal habeas review absent a showing of (a) cause for the noncompliance, and (b) actual prejudice resulting from the alleged constitutional violation. 433 U.S. at 84 and 87.

To escape the reach of Myers, therefore, petitioner must demonstrate to this Court both "cause" for his failure to raise the Mullaney issue on direct appeal, and "actual prejudice" from the erroneous instruction.

In some cases, these questions could pose genuine issues of fact, and require evidentiary hearings for resolution. In this case, however, I recommend the court conclude both factors are conclusively established by the record before us. Obviously petitioner did not raise the Mullaney issue at trial or in briefs and argument to the court of Appeals of Washington because those events all pre-dated Mullaney. The petition for review in the Supreme Court of Washington was immediately after Mullaney, probably before the case was available in most published reports. The State here has not contended otherwise. The issue was raised in petitioner's first collateral attack in state court. "Cause" is therefore established for the failure to raise the issue on direct appeal.

"Prejudice" is also apparent from the record. The jury was told that if the State proved a homicide beyond a reasonable doubt, the presumption was that it is murder in the second degree; and

---

3/ This decision limited the more permissive standard announced in Fay v. Noia, 372 U.S. 391 (1963).

that it was then defendant's burden to prove that it should be reduced to manslaughter. Apparently defendant did not meet his burden, to the satisfaction of the jury, because he was convicted of second degree murder. This Court cannot second-guess the jury by holding that, even instructed that the burden was on the State and not the defendant, they would have found the proof sufficient beyond a reasonable doubt. If the burden were entirely on the State, the trial might well have been very different, at least as to evidence introduced by or on behalf of defendant. It would be impossible for this Court to conclude, beyond a reasonable doubt, that the outcome would have been the same.

Accordingly, the record meets the "cause" and "prejudice" tests of Wainwright v. Sykes, and petitioner is not foreclosed from federal habeas relief by reason of his state procedural waiver.

CONCLUSION

In summary, I recommend the court conclude as follows:

(1) Petitioner has exhausted his state court remedies.

(2) The record presents no issues of fact. Therefore, no evidentiary hearing is required. The petition is therefore in a posture for final action.

(3) The jury instruction given in this case was invalid, under Mullaney.

(4) The Court should not accept petitioner's argument that he is necessarily entitled to the writ by virtue of the fact that he petitioned for review on direct appeal after the decision in Mullaney.

(5) The Supreme Court in Hankerson gave "complete retroactive effect" to Mullaney, because use of the defective instructions raised serious questions as to the accuracy of guilty verdicts.

(6) The U.S. Supreme Court further held in Hankerson that therefore even severe impact upon the administration of justice would not require prospective application of the rule.

(7) Although in Hankerson the issue was raised on direct appeal, the determination of retroactivity should be read also to apply in cases where an instruction is first challenged on collateral attack, because: (a) "complete retroactive effect" contemplates such application; (b) the reasoning of Hankerson applies equally to direct appeal and collateral attack cases; and (c) although the argument has been presented in Hankerson and other cases, a majority of the U.S. Supreme Court has never yet held that retroactivity turns upon whether an issue is raised on direct appeal or on collateral attack.

(8) The record establishes both "cause" for petitioner's failure to raise the Mullaney issue at trial or on direct appeal, and "actual prejudice" from the constitutional error. Petitioner therefore is not barred from federal habeas relief, Wainwright v. Sykes, although he cannot obtain collateral relief in state court, In re Myers.

(9) The State's Motion to Dismiss should therefore be denied.

(10) Petitioner is therefore entitled to a writ of habeas corpus from this court. The writ should afford the State the opportunity to commence a retrial of petitioner within 60 days from the date the order of this Court becomes final,

which includes final resoluton of any and all appeals from this order. The writ should further provide that, should the State fail to do so petitioner should be released forthwith at the conclusion of that period. A proposed form of order accompanies this Report and Recommendation.

DATED this 21st day of March, 1980.

/s/ John Weinberg
John L. Weinberg
United States Magistrate

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of	)	No. 6371-I
	)	Division One
GLENN R. GIBSON,	)	
	)	FILED
Petitioner.	)	April 9, 1979

CALLOW, C.J. -- Glenn R. Gibson petitions pursuant to RAP 16.3 et seq. for a new trial and release from personal restraint. The petition should be denied.

The petitioner was charged on February 13, 1974, with murder in the first degree. He was found guilty of murder in the second degree by a jury on May 15, 1974, and sentenced on May 29, 1974. His original appeal to this court was based on grounds other than those raised by this personal restraint petition; this court affirmed his conviction on June 9, 1975, in an unpublished opinion.

The State agrees with Gibson that the instruction[1] given by the trial court is now unconstitutional, and that a

---

1. Instruction No. 5 states as follows:

"The court instructs you that where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree. If the state desires to increase the degree to murder in the first degree, the burden is on the state to produce evidence of those facts or circumstances which call for

conviction obtained under an instruction later deemed to be unconstitutional is invalid. The sole remaining dispute concerns whether the petitioner, having previously appealed and lost, is foreclosed from raising for the first time by collateral attack the unconstitutionality of the instruction.

In In re Myers, 91 Wn.2d ___ (1978), the petitioner alleged as one ground for release from personal restraint the trial court's similar use of instructions that allegedly shifted the burden of proof from the prosecution to the defendant on an element of the crime charged. The instructions given, like here, were considered correct statements of the law at the time of Myers' trial years earlier. Acknowledging that later decisions declared unconstitutional the use of instructions that shifted the burden of proof from the State to the defendant on any element of the offense charged and that the validity of such instructions could be raised on direct appeal, Myers states the issue in that case to be the same as the issue under present consideration, i.e., whether the rule declared in Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), and State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977), regarding unconstitutional instructions should be retroactively applied to collateral review proceedings. In re Myers, supra at 123.

---

such increase. If the defendant desires to reduce the degree of manslaughter, the burden is on him to produce evidence of those facts or circumstances which call for such reduction."

Although recognizing the general rule that constitutional questions may be considered for the first time on direct appeal because the defendant's fundamental right to a fair trial is seen to outweigh the State's benefits to be derived from requiring all arguments to be initially made at the trial level, Myers declares that the scales tip in favor of finality and rehabilitation when error involving unconstitutional instructions is raised for the first time by way of collateral attack.

> When a trial has been held, a conviction affirmed on appeal, and a period of time thereafter elapses, we believe the negative effect on the administration of justice outweighs the interest of a defendant in having his guilt redetermined in accordance with subsequent decisions of this court or the United States Supreme Court.
>
> Evidence necessary for retrial may no longer be extant. Witnesses may have moved or died and memories certainly will have dimmed. Further investigation, difficult at best, may be impossible. Such factors could, and in this case probably would, make effective retrial of Myers impossible.

In re Myers, supra at 124 (emphasis added). Concerned with the innumerable pitfalls behind these possibilities and probabilities, Myers further notices the probable unreliability of a new trial and the consequent burdens that would result should retrials be required in all cases -- such as this -- involving the use of

similar instructions. Accordingly, and without requiring a hearing on the possibility of retrial, Myers denied the petition and states as follows:

> Assuming the challenged instructions in the present case are defective under Roberts and Mullaney, the question is whether this new rule should be applied retroactively to this collateral review proceeding. The importance of finality in a rational system of justice leads us to conclude that it should not.
>
> . . .
>
> We find that the interest of the state in achieving a final judgment not subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards. Executive clemency and the parole system are available for those cases that are particularly deserving. Accordingly, we hold that the general rule -- i.e., the failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent proceedings -- applies to alleged errors raised for the first time on collateral attack.

In re Myers, supra at 123, 125.

The petition is denied.

/s/ Callow, C.J.
CALLOW, C.J.

WE CONCUR:

/s/ James, J.

/s/ Williams, J.

APPENDIX D

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 3072-I
	)	
Respondent,	)	
	)	
v.	)	DIVISION ONE
	)	
GLENN RUPHERT GIBSON,	)	FILED
	)	JUNE 9, 1975
Appellant.	)	
	)	

FARRIS, J. -- Glenn Gibson appeals from judgment entered on a jury verdict finding him guilty of second degree murder. His primary defense to a charge of intentionally drowning the decedent is his allegation that her death was not due to drowning but to a lethal combination of alcohol and phenobarbital, traces of which were found in her blood.

The physician who performed the autopsy on the deceased determined that death was caused by drowning and so testified at trial. Prior to that testimony, Gibson requested a ruling from the court on his wish to use ten textbooks and treatises in cross-examining the witness. The court permitted cross-examination from seven of the ten; error is assigned to disallowance of the remaining three.

Following direct and cross-examination of the expert witness, Gibson called his own expert who identified the three disallowed treatises as authoritative. No effort was thereafter made to cross-examine the State's expert by use of the disputed treatises. Gibson argues that the prior ruling disallowing his use

of the three treatises violates the rule in Dabroe v. Rhodes Co., 64 Wn.2d 431, 392 P.2d 217 (1964), which permits cross-examination of experts from treatises properly proven to be authoritative. We disagree.

In this jurisdiction, an expert may not block his own cross-examination from authoritative treatises or texts by refusing to admit that they are authoritative; however, the cross-examiner has the burden of proving their authoritative character by other means, absent a concession by the expert under examination. Dabroe v. Rhodes Co., supra; Sanderson v. Moline, 7 Wn. App. 439, 499 P.2d 1281 (1972). The mere assertion by counsel that a treatise is authoritative will not sustain that burden. McCay v. Mitchell, 62 Tenn. App. 424, 463 S. W. 2d 70 (1970).

Here an affidavit of an alleged expert, and nothing more, was before the trial judge when he initially ruled on the use of the textbooks and treatises for cross-examination purposes. The trial court did not abuse its discretion in refusing to permit cross-examination from the disputed texts on the basis of such proof, although it gave the wrong reason for its ruling.

A renewal of the request after Gibson's expert had testified would have put the question of whether the treatises were authoritative squarely before the court. This was not done. Further, the record reflects that the State's expert was thoroughly cross-examined by Gibson from the texts and treatises approved by the court. Gibson makes no specific allegation of prejudice by the court's disallowance of the three treatises for cross-examination purposes and we find none.

At trial, pretrial statements made by Gibson were admitted into evidence. Gibson argues that he was not competent at the time he made the statements and they were therefore improperly admitted. The record reflects that expert evidence was introduced at a 3.5 hearing regarding para-amnesia, the primary symptom of which is the false recollection of traumatic events in a rather scattered fashion. The trial court found that Gibson's statements were made voluntarily and admitted the evidence without making a specific finding on the question of Gibson's mental competency.

Confessions and other pretrial statements of the accused are governed by the same rule with respect to competency as is witness testimony. State v. Allen, 67 Wn.2d 238, 406 P.2d 950 (1965); State v. Ratow, 4 Wn. App. 321, 481 P.2d 20 (1971). The rule is that

> in the absence of an adjudication of insanity or incompetency, and in the absence of any action by the state or its officers which could be said to make a confession involuntary, a confession by a mentally ill defendant would be admissible with the defendant at liberty to introduce evidence of any circumstances that might affect its voluntariness or its probative value.

State v. Allen, supra at 242. Accord, State v. Alvis, 70 Wn.2d 969, 425 P.2d 924 (1967). See State v. Morrison, 43 Wn.2d 23, 259 P.2d 1105 (1953); State v. Ratow, supra at 327, wherein we held:

> If a person has been adjudicated insane, a rebuttable presumption

> arises that he is incompetent to testify. Where there has been no adjudication, the burden of showing incompetency is upon him who objects on that ground.

In the absence of proof by Gibson of an adjudication of his insanity or incompetency, the trial court's findings that the statements sought to be introduced were voluntarily given was sufficient for their introduction into evidence and was not an abuse of discretion.

Affirmed.

Pursuant to RCW 2.06.040, this opinion will not be published.

/s/ Farris, J.

WE CONCUR

/s/ Swanson, J. /s/ James, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN RUPHERT GIBSON,	)	
	)	
Plaintiff-Appellants,	)	NO. 80-3522
	)	
v.	)	DC CV 79-1236
	)	WTM
JAMES SPALDING, SLADE GORTON and DIXIE LEE RAY,	)	
	)	
Defendants-Appellants.	)	
	)	

APPEAL from the United States District court for the WESTERN district of WASHINGTON (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered on October 30, 1981.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN RUPHERT GIBSON,	)	
	)	
Plaintiff-Appellee,	)	No. 80-3522
	)	
vs.	)	D.C. No.
	)	C79-1236M
JAMES SPALDING, SLADE GORTON and DIXIE LEE RAY,	)	O R D E R
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the Western District of Washington.

Before: WALLACE and TANG, Circuit Judges, and STEPHENS,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed on January 5, 1982.

---

* Honorable Albert Lee Stephens, Jr., United States District Judge, Central District of California, sitting by designation.

Opposition

RECEIVED
APR 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-1750

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,

Petitioner,

vs.

GLENN RUPHERT GIBSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN B. MIDGLEY
Counsel of Record for Respondent

EVERGREEN LEGAL SERVICES
109 Prefontaine Place South
Seattle, WA 98104
(206) 464-5911

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT FOR DENIAL OF THE WRIT 3

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED . . . 5

I. SINCE THE STATE COURTS DECIDED ON THE MERITS THE FEDERAL CONSTITUTIONAL ISSUE ON WHICH MR. GIBSON WAS GRANTED FEDERAL HABEAS CORPUS RELIEF, THERE WAS NO PROCEDURAL DEFAULT WHICH COULD EVEN ARGUABLY PREVENT FEDERAL HABEAS REVIEW OF THE SAME ISSUE . . . 5

II. EVEN IF THE STATE COURTS COULD BE SAID TO HAVE DECIDED THE CRUCIAL ISSUE ON A PURPORTED PROCEDURAL GROUND, SUCH PURPORTED GROUND WOULD NOT BE ADEQUATE AS A MATTER OF FEDERAL LAW TO EVEN INVOKE QUESTIONS OF CAUSE AND PREJUDICE 8

III. THE HOLDING OF THE NINTH CIRCUIT IN THE NARROW FACTUAL SITUATION PRESENTED IN THIS CASE NEITHER HAS THE DRASTIC EFFECTS CLAIMED BY THE STATE NOR CONTRIBUTES TO A CONFLICT AMONG THE CIRCUITS 14

A. The Ninth Circuit Held Only That An Attorney's Failure To Raise On Appeal A Plainly Applicable Recent United States Supreme Court Decision Which Would Have Required Reversal Of His Client's Conviction Will Form A Basis For Habeas Corpus Relief 15

B. The State's Claims About The Nature And Implications Of The Ninth Circuit Decision Are Not True 16

C. The Ninth Circuit Decision In This Case Is Not Involved In A Conflict Among The Circuits On The Meaning Of "Cause" 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Bouie v. City of Columbia, 378 U.S. 347 (1964) 12,13

Davis v. United States, 411 U.S. 233 (1973) 12

Engle v. Isaac, ____ U.S. ____, 50 U.S.L.W. 4376 (April 5, 1982) 10,12,13,16,18,19

Francis v. Henderson, 425 U.S. 536 (1976) 13

Gibson v. Spalding, 665 F.2d 863 (9th Cir. 1981) . 1,2,3,15,17

Hankerson v. North Carolina, 432 U.S. 233 (1977) 7,8,9,10,11,12,14,18

In re Gibson, Washington Court of Appeals unpublished opinion No. 6371-I 5,8

In re Haynes, 95 Wn.2d 648, 628 P.2d 809 (1981) 7

In re Lee, 95 Wn.2d 357, 623 P.2d 687 (1980) 7

In re Myers, 91 Wn.2d 120, 587 P.2d 532 (1978), cert. denied sub nom. Myers v. Wabhington, 442 U.S. 912 (1979) 5,6,7,8,9,10,13

In re Winship, 397 U.S. 358 (1970) 16

Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980), reversed, Engle v. Isaac, ____ U.S. ____, 50 U.S.L.W. 4376 (April 5, 1982) 17

Mullaney v. Wilbur, 421 U.S. 684 (1975) 2,3,5,6,7,9,10,11,15,16

Myers v. Washington, 646 F.2d 355 (9th Cir. 1981), petition for writ of certiorari pending, No. 81-1056 . . 17

NAACP v. Alabama, 375 U.S. 449 (1958) 11,13

State v. Mayes, 29 Wn. App. 184, 579 P.2d 999 (1978) . . . 15

State v. Modica, 18 Wn. App. 467, 569 P.2d 1161 (1977) . . 15

Staub v. Baxley, 355 U.S. 313 (1958) 12

Ulster County Court v. Allen, 442 U.S. 140 (1979) . . . 5,13

Wainwright v. Sykes, 433 U.S. 72 (1977) 4,5,8,11,12,13,14,15,18,19

Williams v. Georgia, 373 U.S. 375 (1955) 11,13

Williams v. United States, 401 U.S. 646 (1971) 8,14

Wright v. Georgia, 373 U.S. 284 (1963) 11,13

Other Authority

Washington Rule of Appellate Procedure (RAP) 2.5(a) . . . 2

COUNTERSTATEMENT OF THE CASE

The State of Washington ("State") in its Petition For Writ of Certiorari ("Petition") does not present a complete and accurate characterization of the facts of this case. Therefore, Respondent Glenn Ruphert Gibson ("Mr. Gibson) presents below facts omitted or mischaracterized by the State. The Court is also referred to the facts as set out in the opinion of the Court of Appeals in this case. Gibson v. Spalding, 665 F.2d 863 (9th Cir. 1981).

Mr. Gibson was convicted of second degree murder under an instruction which required the jury to presume that where a homicide is proven beyond a reasonable doubt, it is second degree murder, and placed the burden on Mr. Gibson to reduce the degree to manslaughter. Gibson v. Spalding, supra, 665 F.2d at 867, n. 2. This instruction was the one challenged in these proceedings. Mr. Gibson denied that he had committed any intentional act leading to death, and claimed that death was caused by the victim's ingestion of lethal amounts of drugs and alcohol. Id. at 867. Specific intent to kill is an explicit element of second degree murder in Washington. Revised Code of Washington (RCW) 9A.32.050(1)(a).

The State admitted throughout post-conviction proceedings that the challenged instruction was unconstitutional and that it rendered Mr. Gibson's conviction invalid. In re Gibson, Washington Court of Appeals Opinion No. 6371-I, attached in the Appendix to the State's Brief in the United States Court of Appeals for the Ninth Circuit[1]; Ninth Circuit Court of

---

[1] See Petition herein at 33a-34a, Washington Court of Appeals Opinion in In re Gibson, No. 6371-I: "The state agrees with Gibson that the instruction given by the trial court is now unconstitutional, and that a conviction obtained under an instruction later deemed to be unconstitutional is invalid." [Footnote omitted.]

Appeals Clerk's Record ("CR") 5 at 1; State's Brief in the Ninth Circuit at 4-5. This admission was reiterated in the Ninth Circuit's opinion in this case. Gibson v. Spalding, supra, 665 F.2d at 867. There has thus been little, if any, dispute about the unconstitutionality of the instruction. The main dispute has been over whether Mr. Gibson may, because of a claimed procedural default, seek federal habeas relief.

Mr. Gibson disputes the State's legal claim, contained in its Statement of the Case, that state courts denied his post-conviction petition on a purported procedural ground. See Petition at 6-7. Rather, as is shown at pp. 5-8 below, Mr. Gibson's petition was denied by the state courts on the federal constitutional merits, not on a basis required by state procedural law.

Mr. Gibson also disputes the State's characterization of Washington procedural law which is contained in the Petition's Statement of the Case. Petition at 4-5. Contrary to the State's characterization, Washington law grants the right to raise on appeal constitutional errors in criminal trials, even if such errors were not raised in the trial court. Washington Rule of Appellate Procedure (RAP) 2.5(a), reproduced in the Petition at 2-3. In addition, Washington does not foreclose from collateral review in post-conviction proceedings the type of claim raised by Mr. Gibson in this case. See pp. 8-14, below. Therefore, Mr. Gibson also disputes the State's claim that any cognizable procedural default occurred in this case.

Mr. Gibson also disagrees with the State's reading of the holding of the Ninth Circuit in this case. See Petition at 8-9. The Ninth Circuit found a procedural default on appeal, but found that "cause" for the default had been shown. The Circuit reasoned that since Mullaney v. Wilbur, 421 U.S. 684 (1975) (which was decided about four months before Mr. Gibson's state

appeal was final) was so obviously applicable to Mr. Gibson's case, an attorney aware of Mullaney would have had no legitimate reason not to raise it during the appeal, and therefore Mr. Gibson's attorney must not have been aware of Mullaney. Gibson v. Spalding, supra, 656 F.2d at 864, 866-867. It was this attorney failure, claimed by Mr. Gibson to be ineffective assistance of counsel, which formed the basis for the Circuit's finding of "cause". Ibid. The State's attempt to imply that the Circuit somehow blindly "presumed" the basis for "cause" is thus misleading.

Finally, the State's factual suggestion, located in its argument (Petition at 9) that the Court of Appeals has "released a murderer" is wrong on three counts. First, Mr. Gibson has been released on parole by Washington authorities, not by any court, and has yet to gain any relief on his petition for writ of habeas corpus despite having prevailed in two courts. Second, neither the District Court nor the Court of Appeals has ever ordered outright release, but has always given the State the option of retrial. See Order Granting Petition for Writ of Habeas Corpus reproduced in the Petition herein at 12a-13a. Third, given Mr. Gibson's denial of the charges against him and a conviction under an instruction affecting the accuracy of the fact-finding process, the question whether Mr. Gibson is a murderer remains seriously in doubt.

SUMMARY OF ARGUMENT FOR DENIAL OF THE WRIT

The State's histrionic characterization of this case and its implications (Petition at 9-11) suffers a major defect: the case described in the Petition is not the present case. Inspection of the true facts and holding in the present case reveals that the State's claims about it are misleading and that certiorari should not be granted.

First, there is no issue of procedural default in the

present case. Washington State courts decided Mr. Gibson's constitutional claim on the merits in post-conviction proceedings, and they continue to decide such cases on the merits on a case-by-case basis. Therefore, the lower federal courts were not precluded from entertaining, and granting, Mr. Gibson's petition. See §I under "The Petition For Writ of Certiorari Should Be Denied", below.

Second, even if it could be said that the state courts denied Mr. Gibson's claims on asserted procedural grounds, federal review would not be precluded. There was, at the time of Mr. Gibson's trial and appeal, no state procedural rule adequate as a matter of federal law to even raise the question of excuse for failure to follow such a rule under Wainwright v. Sykes, 433 U.S. 72 (1977). Therefore, no question of excuse for a procedural default is presented, and the case was properly heard on the merits. See §II under "The Petition For Writ of Certiorari Should Be Denied", below.

Third, even if the state courts had decided the case on a procedural ground adequate to invoke the Wainwright "cause-prejudice" test, there is no reason for this Court to grant certiorari. This case, as decided by the Ninth Circuit, grants relief in a narrow factual situation, i.e. where an appellate attorney failed to raise on appeal the application of a recent United States Supreme Court decision which plainly invalidated his client's conviction. A grant of certiorari would be inappropriate because this case thus neither presents the broad precedential effects claimed by the State, nor engenders any serious conflict among the Circuits. See §III under "The Petition For Writ of Certiorari Should Be Denied", below.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. SINCE THE STATE COURTS DECIDED ON THE MERITS THE FEDERAL CONSTITUTIONAL ISSUE ON WHICH MR. GIBSON WAS GRANTED FEDERAL HABEAS CORPUS RELIEF, THERE WAS NO PROCEDURAL DEFAULT WHICH COULD EVEN ARGUABLY PREVENT FEDERAL HABEAS REVIEW OF THE SAME ISSUE.

Wainwright v. Sykes, 433 U.S. 72 (1977) establishes a "cause-prejudice" test for determining whether federal issues will be heard on federal habeas corpus despite a failure to follow certain state procedural rules. However, it is obvious that the Wainwright "cause-prejudice" test applies only when state courts have refused to hear a habeas petitioner's federal constitutional claims on procedural grounds; federal habeas courts are in no way precluded from hearing cases which have been decided by state courts on the merits of federal constitutional claims. Wainwright v. Sykes, supra, 433 U.S. at 87. A federal court reviewing a state's claims of procedural default must determine whether the state has in fact refused to hear federal constitutional issues on state procedural grounds. Ulster County Court v. Allen, 442 U.S. 140 (1979). Where the state court has denied a petitioner's federal constitutional claims on the merits, federal courts do not show disrespect for valid state procedural rules by themselves determining such claims. Ibid.

The state courts decided on the federal constitutional merits Mr. Gibson's post-conviction claim that Mullaney v. Wilbur, 421 U.S. 684 (1975), should be retroactively applied to his case. The state court decision was based entirely on the Washington Supreme Court's opinion in In re Myers, 91 Wn. 2d 120, 587 P.2d 532 (1978), cert. denied sub nom. Myers v. Washington, 442 U.S. 912 (1979). See Washington Court of Appeals opinion, In re Gibson, No. 6371-I, in the Appendix to the Petition herein at 33a-36a. The Myers test was applied to Mr.

Gibson's case, and the petition was denied. Ibid. Therefore, if Myers was decided on substantive, rather than procedural, grounds, then the present case was similarly decided, and there could be no procedural bar to Mr. Gibson's federal habeas petition. And, as is shown below, Myers was a substantive decision, and therefore so was the state court decision in this case.

Myers presented five federal constitutional claims to the state courts. Four of these claims were decided on the ground that issues which could reasonably have been raised on direct appeal could not be raised in collateral proceedings. In re Myers, supra, 91 Wn.2d at 121-123. The fifth, the issue of retrospective application of Mullaney v. Wilbur and its state counterpart (the same issue presented by Mr. Gibson in his state petition), presented a "slightly different question" (Id. at 123):

> Assuming the challenged instructions in the present case are defective under Roberts and Mullaney, the question is whether this new rule should be applied retroactively to this collateral review proceeding.

Id. at 123-124. The Washington court then applied a balancing test to determine the issue of retroactivity and held that

> The negative effect on the administration of justice outweighs the interest of a defendant in having his guilt redetermined in accordance with subsequent decisions of this court or the United States Supreme Court.

Id. at 124. After thus determining the retroactivity issue, the court elaborated:

> We find that the interest of the state in achieving a final judgment not subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards. Executive clemency and the parole system are available for those cases that are particularly deserving. Accordingly, we hold that the general rule--i.e., the failure to identify errors at trial or prosecute them on appeal precludes reliance thereon in subsequent proceedings--applies to alleged errors raised for the first time on collateral attack.

Id. at 125-126.

The Washington Supreme Court, in two subsequent opinions, both authored by Justice Hicks, who wrote In re Myers, has conclusively demonstrated that the retroactivity issue in Myers (and therefore in this case) was decided on the merits. In In re Lee, 95 Wn.2d 357, 362, 623 P.2d 687 (1980), the Myers holding was characterized as follows:

> All of the grounds urged, except one, could reasonably have been raised by Myers on appeal, if any were seriously regarded. They were not. The one exception was a change in this state's law of presumptions brought about by Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) and State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). Myers claimed the benefit of retroactive application of the new constitutional rule as applied to presumptions. His petition was denied. We did not reach the merits of those issues which could reasonably have been raised on appeal but were not, and the retroactivity issue was decided adversely to Myers.

(Emphasis added.) Similarly, in In re Haynes, 95 Wn.2d 648, 651, 628 P.2d 809 (1981), the Washington Supreme Court said:

> The Myers rule requires that those issues, constitutional or nonconstitutional, which were known or could have been known yet were not raised at trial nor on direct appeal, may not be raised on collateral attack. Those constitutional interpretations not yet articulated in decisional law, and which could not have been anticipated, will be considered on collateral attack, subject to our strong public policy interest in the finality of judgments and the avoidance of later and inevitably less reliable criminal trials.

(Emphasis added.)

The above materials conclusively show that the Washington courts decided the retroactivity issue on the merits, not on any basis required by Washington procedural rules. The state courts have sought to deny retrospective application to Mullaney based upon a balancing test employing impact on the administration of justice as a balancing factor. This is exactly what the North Carolina Supreme Court had done in Hankerson v. North Carolina, 432 U.S. 233 (1977), and is exactly what this Court rejected in granting Mullaney complete retroactive effect. As stated initially in Williams

v. United States, 401 U.S. 646, 653 (1971), and quoted and followed in Hankerson:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

432 U.S. at 241. The retroactive impact of Mullaney thus may not be avoided on the grounds advanced in In re Myers and In re Gibson.

Since the state decided on the merits the issue on which Mr. Gibson prevailed in federal court, and since there is no procedural bar in Washington to raising retroactivity claims on collateral attack, no issue under Wainwright v. Sykes is even presented in this case. The Ninth Circuit need not have reached Wainwright issues, and this Court should not grant certiorari to determine issues which would not be reached.

II. EVEN IF THE STATE COURTS COULD BE SAID TO HAVE DECIDED THE CRUCIAL ISSUE ON A PURPORTED PROCEDURAL GROUND, SUCH PURPORTED GROUND WOULD NOT BE ADEQUATE AS A MATTER OF FEDERAL LAW TO EVEN INVOKE QUESTIONS OF CAUSE AND PREJUDICE.

The State herein claims that its courts acted on procedural grounds and "insulated" Mr. Myers' conviction from federal review under Wainwright v. Sykes, supra, and Hankerson v. North Carolina, supra. See Petition at 19-23. However, even assuming (but not conceding, see §I above) that the state court decided Mr. Myers' case on an asserted procedural ground, this is of no avail to the State. For, as is shown below, whatever may be the extent of "insulation" allowable in other cases, adequate insulation could not be found in the present case, and Wainwright "cause" questions are therefore not implicated here.

This Court held in Hankerson v. North Carolina, supra

that Mullaney v. Wilbur, supra is to be given complete retroactive effect. Full retrospective application is required because the rule of Mullaney:

> Was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function."

Hankerson v. North Carolina, supra, 432 U.S. at 242. This Court unequivocally and repeatedly emphasized that the rule of Mullaney, which is required in order to protect the integrity of the fact-finding process, is to be given retroactive effect without regard to prior reliance on contrary rules or impact on the administration of justice. Id. at 241-244.

A possible narrow escape hatch from the full retroactive application of Mullaney was suggested in a footnote to Hankerson, which states in part:

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed. Rule Crim. Proc. 30.

432 U.S. at 244, f.n. 8. This footnote suggests that states might be able to avoid retroactive application of the truth-protecting rule of Mullaney by: 1) enforcing; 2) an existing written rule of procedure (like Fed. Rule Crim. Proc. 30); 3) which informs defendants and their counsel that failure to contemporaneously object is a waiver of any claim of error.

The Washington Supreme Court could not, under the Hankerson footnote, conceivably insulate Mr. Gibson's confiction from the retrospective impact of Mullaney. As is demonstrated in §I above, the Washington court's opinion in In re Myers (which was the basis for the state court ruling in this case) did not, as arguably allowed by the Hankerson footnote, enforce a pre-existing contemporaneous objection rule the enforcement of which operated incidentally to deny a non-objector the retroactive impact of Mullaney. Rather, the Washington court (if

In re Myers can be seen as a procedural case) clearly 1) used considerations of impact on the administration of justice to 2) formulate for the first time a rule that failure to raise a constitutional infirmity in an instruction at trial or on appeal will prevent raising a retroactivity claim in a collateral proceeding. There was, and is, in Washington no contemporaneous objection rule requiring objection at trial to unconstitutional instructions; constitutional infirmities may be raised for the first time on appeal. Washington RAP 2.5(a). Moreover, at least until In re Myers itself, there was no rule precluding retroactive collateral relief absent objection at trial or on appeal.[2]

These facts distinguish completely this Court's recent decision in Engle v. Isaac, ____ U.S. ____, 50 U.S.L.W. 4376 (April 5, 1982), and preclude the State's attempted reliance on footnote 8 of Hankerson. As this Court noted in Engle, the Hankerson footnote may allow insulation in some circumstances where a procedural default has occurred. 50 U.S.L.W. at 4383, n. 43. In Engle itself, for example, Ohio had a clear, written contemporaneous objection rule with respect to jury instructions which petitioners failed to follow. 50 U.S.L.W. at 4378, n. 15. However, the Hankerson footnote could not possibly be distorted to allow what Washington has tried to do to Mr. Gibson. The footnote could at most be read, as in Engle, to allow enforcement of a clear, previously existing state contemporaneous

---

[2]The Myers opinion consists of two holdings. Myers raised five issues, one of which was the retroactive application of Mullaney. The Washington Supreme Court ruled that: (1) the four issues in which retroactivity was not an issue could not be raised in a collateral proceeding, and (2) Mullaney would not be applied retroactively. In Support of (1), the Court cited one earlier case; in support of (2), no previous Washington decision was cited. See 91 Wn.2d at 122, 123-216. This fact and the language used by the Washington Supreme Court prove that the rule in the second part of the opinion was new, not a previously-existing rule.

objection rule the operation of which precluded retrospective application of Mullaney. The footnote could not be read to allow states to formulate a new rule after the fact of a purported default and then apply it to a person who could not have had notice of such new rule.

Washington, having tried to formulate just such a new rule and apply it after the fact to Mr. Gibson, cannot conceivably insulate Mr. Gibson's conviction under Hankerson. Therefore, no issue of "insulation" or "cause" under Wainwright is presented because Mr. Gibson has committed no procedural default cognizable under Hankerson's "insulation" language.

Reading Hankerson and Wainwright together, as suggested by the State (Petition at 21-22), compels the same conclusion. Wainwright is based on the doctrine of adequate and independent state procedural grounds which potentially can prevent federal review of federal claims. This Court held that, as to those issues to which Wainwright applies, an adequate state procedural ground will prevent habeas review of federal issues unless the "cause/prejudice" test is met. The dictum in footnote 8 of Hankerson, generated six days before the decision Wainwright, also speaks in terms of procedural default, and is similarly based on the doctrine of the adequate and independent state procedural ground. Examination of that doctrine shows that there is no adequate state ground in this case.

Federal review is not precluded in every case in which a state refuses on asserted procedural grounds to hear a federal constitutional claim. Rather, the doctrine of adequate state procedural grounds requires, as a threshold matter, review of the adequacy as a matter of federal law of procedural grounds asserted by the state as a bar to federal review. See, e.g., NAACP v. Alabama, 375 U.S. 449 (1958); Williams v. Georgia, 373 U.S. 375 (1955); Wright v. Georgia, 373 U.S. 284, 291

(1963); Bouie v. City of Columbia, 378 U.S. 347, 354 (1964); Staub v. Baxley, 355 U.S. 313 (1958).

Wainwright and Hankerson are squarely in the line of cases requiring careful scrutiny of the adequacy of state grounds at the threshold. In Wainwright, this Court meticulously determined both the existence of and constitutional adequacy of the state procedural rule which the court ultimately held would bar federal inquiry into the state court judgment. 433 U.S. at 85-87. Only after the adequacy of the state procedural ground was determined did the "cause/prejudice" test come into play. Ibid. Similarly, in footnote 8 of Hankerson (decided six days before Wainwright), the Court spoke of a "normal and valid" contemporaneous objection rule and cited Fed. Rule Crim. Proc. 30 (a clear, written rule giving notice of default absent objection) as an example. Therefore, unless an asserted state procedural ground meets federal standards for adequacy, analysis simply does not proceed to the "cause/prejudice" test of Wainwright, and federal review on the merits is warranted.

Application of federal standards for adequate state procedural grounds finds the state's asserted procedural ground in this case seriously wanting. A state procedural ground is adequate only if it is embodied in a rule which gives clear notice that a failure to assert a claim will be a waiver. See, e.g., Engle v. Isaac, supra, 50 U.S.L.W. at 4378 (Ohio Rule Crim. Proc. 30); Hankerson v. North Carolina, supra, 432 U.S. at 242, f.n. 8 (example of Fed. Rule Crim. Proc. 30); Wainwright v. Sykes, supra, 433 U.S. at 76 [Florida Rule Crim. Proc. 3.190 (i)]; Davis v. United States, 411 U.S. 233, 234 (1973) [Fed. Rule Crim. Proc. 12(b)(2)]; Francis v. Henderson, 425 U.S. 536, 537 (1976) (provisions of Louisiana Code of Criminal Procedure). Moreover, in the area of forfeiture of constitutional rights of the accused, a contemporaneous objection rule has generally

been required, i.e. a rule holding that failure to assert a claim at or before trial will be a waiver of any claim or error. See Engle v. Isaac, supra, 50 U.S.L.W. at 4377 (contemporaneous objection rule); Wainwright v. Sykes, supra, 433 U.S. at 74, 84-86, 88-91; Ulster County Court v. Allen, supra (lack of contemporaneous objection rule). In addition, asserted procedural defaults will not preclude review of constitutional claims when such defaults are unforeseeable under state law and/or are produced by novel application of state rules. NAACP v. Alabama, supra; Bouie v. City of Columbia, supra. See also Wright v. Georgia, supra, 373 U.S. at 291. Finally, state courts must apply a procedural rule fairly before it can qualify as an adequate state ground sufficient to bar the door to federal court; as stated by this Court:

> [W]here a state allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. [Footnote omitted.]

Williams v. Georgia, supra, 349 U.S. at 383. (Emphasis added.)

The State's asserted procedural default in the present case fails all federal tests as an adequate state ground. As is shown above at pp. 9-11, at the time Mr. Gibson supposedly defaulted on his claim of unconstitutional instructions, there was no state objection rule in effect as to such defects, let alone a clear contemporaneous objection rule giving adequate notice of loss of rights upon default. Moreover, as is shown on the same pages, the rule the state tries to apply to Gibson was novel in Washington and was first announced in In re Myers, decided several years after Mr. Gibson's trial. Mr. Gibson obviously could not be expected to have followed such a rule. Finally, the rule asserted by the State is far from consistently

applied; as is shown at pp. 6-7 above, the Washington Supreme Court flatly asserts that some claims like the retroactivity claim raised by Mr. Gibson in this case will be heard in collateral proceedings in state court, while others, including Mr. Gibson's, were not.

The asserted "procedural" ground advanced by the state in the present case is thus totally inadequate as a matter of federal law. The procedural rule was generated and applied to Mr. Gibson in "avoidance of the federal right", Williams v. Georgia, supra, 349 U.S. at 383.

Since the asserted state procedural ground is inadequate to preclude federal review, and since footnote 8 of the Hankerson opinion does not supply the missing adequacy, questions of the meaning of "cause" under Wainwright are not implicated in this case. Certiorari therefore should be denied.

III. THE HOLDING OF THE NINTH CIRCUIT IN THE NARROW FACTUAL SITUATION PRESENTED IN THIS CASE NEITHER HAS THE DRASTIC EFFECTS CLAIMED BY THE STATE NOR CONTRIBUTES TO A CONFLICT AMONG THE CIRCUITS.

As has been shown in §§I and II above, the Court of Appeals for the Ninth Circuit need never have reached questions of "cause" under Wainwright v. Sykes, supra, since Wainwright considerations are not implicated here. However, the Ninth Circuit did apply the Wainwright "cause-prejudice" test and nevertheless affirmed the granting of the writ in the circumstances of this case. The State, in its Petition in this Court, makes many assertions about a claimed broad impact of the Ninth Circuit's ruling, and further claims that this case is a significant contributor to a conflict among the circuits on the meaning of "cause". As is shown below, the State's claims are overstated, and there is no reason for this Court to grant certiorari to review the narrow decision of the Ninth Circuit in this case.

A. The Ninth Circuit Held Only That An Attorney's Failure To Raise On Appeal A Plainly Applicable Recent United States Supreme Court Decision Which Would Have Required Reversal Of His Client's Conviction Will Form A Basis For Habeas Corpus Relief.

The Ninth Circuit in the present case was faced with the following situation: this Court decided Mullaney v. Wilbur, supra, about four months before Mr. Gibson's direct appeal became final; Mullaney plainly rendered a critical jury instruction unconstitutional; a Mullaney claim could have been injected into the appellate process and would have been heard by the state courts; if such a claim had been raised, Mr. Gibson's conviction of second degree murder would have been reversed[3]; Mr. Gibson claimed not only that this situation constituted "cause" under Wainwright v. Sykes, but alternatively that the attorney's failure to raise Mullaney was ineffective assistance of counsel. Gibson v. Spalding, supra, 665 F.2d at 866-867.

Not surprisingly, the Ninth Circuit found that Mr. Gibson was entitled to be heard on the merits of his federal constitutional claims. The Circuit found that this situation was one in which "cause" under Wainwright was present (because there simply could be no "tactical" reason for the failure to raise Mullaney on direct appeal), and did not reach the question whether Mr. Gibson had made out his claim of ineffective assistance.

Had the Ninth Circuit reached the ineffective assistance claim, the result in the present case would have been the same.

---

[3]Washington courts have, to counsel's knowledge, reversed every second degree murder conviction in which the Mullaney defect was raised on appeal, whether or not an objection was raised in the trial court. See, e.g., State v. Modica, 18 Wn. App. 467, 479-481, 569 P.2d 1161 (1977) (no objection in trial court, defendant proposed the same instruction, conviction reversed); State v. Mayes, 29 Wn. App. 184, 187-188, 579 P.2d 999 (1978) (unclear whether objection made at trial, conviction reversed).

It is difficult to imagine a clearer case of prejudicial ineffective assistance: an attorney's failure to raise an issue based on clear and controlling United States Supreme Court authority with respect to an instruction casting doubt on the truth of the verdict, where raising the issue would have required reversal and a failure to raise it might forfeit the claim. This is ineffective assistance of counsel in its most pristine form, and Mr. Gibson was entitled to relief.

Both the claim of ineffective assistance of counsel and the facts underlying that claim distinguish the present case from this Court's recent decision in Engle v. Isaac, supra. There was apparently no claim of ineffective assistance in Engle. Moreover the Engle decision involved cases in which counsel could, on the basis of In re Winship, 397 U.S. 358 (1970), have raised an arguable but as yet unaccepted challenge to jury instructions shifting the burden of persuasion on self-defense; this Court declined to fault counsel for failing to so extrapolate from Winship. See 50 U.S.L.W. at 4383. In contrast, the present case involves not extrapolation, but a clear dereliction, by counsel: the failure to raise in a second degree murder case the unconstitutionality of a burden-shifting intent instruction under a decision of this Court (Mullaney) which had already extended Winship to a closely similar instruction. This failure in Mr. Gibson's case renders unassailable the Ninth Circuit's decision in this narrow factual posture.

B. The State's Claims About The Nature And Implications Of The Ninth Circuit Decision Are Not True.

The State, in its attempt to lead this Court into granting certiorari, mischaracterizes both the nature and implications of the present case. Since these claims are incorrect, as is shown below, these arguments by the State do not provide any ground for granting the writ.

Many of the State's factual premises about the Ninth Circuit decision are inaccurate. The State claims (both in its statement of issues and in its argument) that the Ninth Circuit decision: 1) was based at least in part on claimed "futility" of objection (Petition at i, 10, 12); 2) the decision was based in part on Myers v. Washington, 646 F.2d 355 (9th Cir. 1981), petition for writ of certiorari pending, No. 81-1056, which in turn was based in part on Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980), reversed, Engle v. Isaac, ____ U.S. ____, 50 U.S.L.W. 4376 (April 5, 1982) (Petition at 13-14).

These premises are wrong. The Ninth Circuit in the present case specifically rejected the applicability of Myers v. Washington, finding that Myers involved questions of unavailability of an issue to be raised while the present case involved failure to raise an issue plainly available on direct appeal. Gibson v. Spalding, supra, 665 F.2d at 866 (two references distinguishing Myers). Similarly, there is no mention by the Circuit of claimed "futility" of objection in this case because the Circuit found that there was an obvious, nonfutile objection which should have been made by the appellate attorney. Id. at 866-867.

The State's wild claims about the implications of the Ninth Circuit's decision are similarly without foundation. The State claims the Ninth Circuit "has radically expanded the scope of review on collateral attack" (Petition at 9). This is not true: the Circuit found Mr. Gibson entitled to relief under a narrow and clear factual situation. See §A, above. The State claims "While this case involves a standard jury instruction concerning the burden of proof in a murder prosecution, the reasoning of the Court of Appeals would be no less applicable in any case involving significant error in jury instructions or evidentiary rulings." Petition at 9. This is not true: the

present case involves an instruction unconstitutionally shifting the burden of proof on intent in a murder case; this Court has found that such an instruction so impugns the integrity of the fact-finding process that retroactive relief will be required in many cases (Hankerson v. North Carolina, supra); this error is far beyond being "any significant" instructional or evidentiary error. The Ninth Circuit's ruling extends no further than egregious constitutional error in the narrow factual situation presented. The State further claims the Ninth Circuit's decision will allow a "new round of collateral attacks" upon "any change or clarification in evolving law", and makes other floodgates arguments (Petition at 10-11). These claims are not true: the only petitioners who will be able to take advantage of the Ninth Circuit's ruling are those whose attorneys neglected to raise clear, controlling, United States Supreme Court precedent relating to instructions so vital to the integrity of the fact-finding process that the denial of due process is demonstrable and clear; most changes in the law will not be significant enough to be found due process violations so egregious as to require full retroactivity, and will have no effect on the availability of collateral attack.[4]

Since the State's claims about the nature, scope, and implications of this case are not true, certiorari should not be granted on these claimed grounds.

C. The Ninth Circuit Decision In This Case Is Not Involved In A Conflict Among The Circuits On The Meaning Of "Cause".

The State advances a claimed conflict among the federal circuits on the meaning of "cause" under Wainwright v. Sykes and puts this forth as an alleged reason for a grant of

---

[4] In any event, many of the types of habeas cases the State wrongly imagines would be caused by the Circuit decision in this case have been disposed of by this Court's decision in Engle v. Isaac.

certiorari in this case. Petition at 11-19. However, as is shown below, the conflict alleged by the State probably no longer exists, and in any event the present case would not be involved in the conflict claimed to exist.

The conflict among the circuits which the State claims is a conflict largely over whether the failure to raise an arguable but inchoate constitutional argument before it is fully accepted by the courts, or when it has been rejected by the courts ("futility of objection"), constitutes "cause" under Wainwright v. Sykes. However, whatever conflict may have existed on such questions seems to have been resolved by this Court's recent decision in Engle v. Isaac, supra. See 50 U.S. L.W. at 4382-4383. The conflict claimed by the State thus appears no longer to exist.

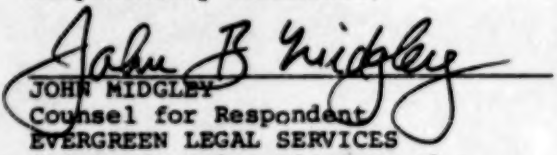
However, even if there did remain a conflict on the questions whether "cause" is made out where an issue is allegedly "unknowable" or objection arguably "futile", the present case is not involved in that conflict. As is shown in B above, the present case is not based on unknowability or futility, but rather was decided on the narrow ground that a clear, obviously knowable, nonfutile constitutional objection should have been made but was not. While other cases may be involved in the conflict claimed by the State, this one is not. Certiorari should not be granted in this case to clear up any alleged conflict among circuits when this case has no part in the conflict.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

DATED this 16th day of April, 1982.

Respectfully submitted,



JOHN MIDGLEY
Counsel for Respondent
EVERGREEN LEGAL SERVICES
109 Prefontaine Place South
Seattle, WA 98104 (206) 464-5911

RECEIVED
APR 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-1750

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,

Petitioner,

vs.

GLENN RUPHERT GIBSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Glenn Ruphert Gibson, through counsel, hereby moves pursuant to Supreme Court Rule 46 for leave to proceed in forma pauperis. This Motion is based upon the fact of Mr. Gibson's poverty, as set forth in his Declaration in Support of Request to Proceed In Forma Pauperis, attached. Respondent, who was a habeas petitioner in the District Court, was granted leave to proceed in forma pauperis in that Court. This status was not changed or revoked by the United States Court of Appeals for the Ninth Circuit.

DATED this 16th day of April, 1982.

Respectfully submitted,

JOHN MIDGLEY
Attorney for Respondent
EVERGREEN LEGAL SERVICES
109 Prefontaine Place South
Seattle, WA 98104
(206) 464-5911

NO. 81-1750

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,

Petitioner,

vs.

GLENN RUPHERT GIBSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 1982 I placed in the United States Mail, first class postage prepaid, addressed to J. Robin Hunt, Counsel of Record for Petitioner, W554 King County Courthouse, Seattle, Washington 98104, one copy of each of the following documents: Brief in Opposition to Petition for Writ of Certiorari; Motion for Leave to Proceed In Forma Pauperis; and Declaration in Support of Request to Proceed In Forma Pauperis.

DATED this 16th day of April, 1982.

John B Midgley

JOHN MIDGLEY
Counsel of Record for Respondent
EVERGREEN LEGAL SERVICES
109 Prefontaine Place South
Seattle, WA 98104
(206) 464-5911

NO. 81-1750

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,

Petitioner,

vs.

GLENN RUPHERT GIBSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

GLENN RUPHERT GIBSON declares as follows:

I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]
   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.
   April 1981 - June 1981; general cleaning work in Arizona. I made a total of $800.

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes [ ] No [X]
   b. Rent payments, interest or dividends? Yes [ ] No [X]
   c. Pensions, annuities or life insurance payments? Yes [X] No [ ]
   d. Gifts or inheritances? Yes [ ] No [X]
   e. Any other sources? Yes [ ] No [X]
   If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.
   Since January 1982 I have gotten a military disability pension of $600/month. I am on parole and must live on $400 of this money (see answer to question 5).

3. Do you own cash, or do you have money in a checking or savings account? Yes [X] No [ ] (Include any funds in prison accounts.)
   If the answer is "yes", state the total value of the items owned.
   About $11.00 in checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.
   Shannon and Clark Gibson, my daughter and son. I pay $200/month out of my disability pension.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 1982
(Date)

Glenn R. Gibson
(Signature)